Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of Competition	)	CS Docket No. 96-133
in the Market for the Delivery of Video Programming	)	

COMMENTS

THE WIRELESS CABLE ASSOCIATION
INTERNATIONAL, INC.

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EXECUTIVE SUMMARY

In large part due to the pro-competitive policies of the 1992 Cable Act and the Commission's implementing rules, wireless cable has emerged as a competitive alternative to wired cable systems. Since the passage of the 1992 Cable Act, the wireless cable industry has experienced substantial subscriber growth. With the recent adoption of the *Declaratory Ruling and Order* which paves the way for the industry to convert to digital technology, the Commission has ensured that wireless cable's growth will accelerate in the coming years.

The benefits of competition from wireless cable can be enhanced by implementing the 1996 Telecommunications Act and fine-tuning the 1992 Cable Act to eliminate unintended impediments to competition. The Commission should implement the 1996 Act with an eye towards promoting wireless cable as true competition to cable. Proper implementation of Section 207 of the 1996 Act as proposed by WCA is essential to assure consumers have fair access to wireless communications services. Similarly, the Commission must minimize the harm to consumers resulting from recent changes to the uniform pricing requirements of the 1992 Cable Act. To do so, the Commission should carefully interpret the new definition of "effective competition" to assure that the uniform pricing requirement is not lifted prematurely. The Commission should interpret the "bulk discount" exception to the uniform pricing rule narrowly.

In addition to carefully implementing the 1996 Act, the Commission should recommend specific changes to the Communications Act, as amended, to further foster competition. Amending Section 628 to assure fair dealing by all programmers, whether or

not vertically integrated and whether or not they utilize satellite distribution, will promote competition. In addition, if necessary, the Commission should recommend that Congress afford the Commission explicit authority over internal cabling devoted to a single multiple dwelling unit, even if such cabling is in common areas.

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The Wireless Cable Association International, Inc. ("WCA"), by its attorneys, hereby submits its initial comments in response to the *Notice of Inquiry* ("*NOI*") commencing this proceeding.[1/]

I. INTRODUCTION.

With the *NOI*, the Commission has for the third time embarked upon the process of gathering information necessary to comply with the mandate of Section 19(g) of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") that the Commission annually report to Congress "on the status of competition in the market for the delivery of video programming."[2/] WCA welcomes this opportunity to assist the Commission in complying with Section 19(g), for there can be no denying that the wireless

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[1/] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 96-265, CS Docket No. 96-133 (rel. June 13, 1996)[hereinafter cited as "*NOI*"].

[2/] 47 U.S.C. § 548(g).

cable industry has been a primary beneficiary of the pro-competitive provisions of the 1992 Cable Act.

This year's *NOI* focuses on the Telecommunications Act of 1996 (the "1996 Act")[3] and its impact on the marketplace. History will record the 1996 Act as a mixed bag for the wireless cable industry. Certainly, several provisions of the 1996 Act already have substantially aided the wireless cable industry's efforts to provide a competitive panoply of communications services to consumers.[4] However, as will be discussed below, the manner in which the Commission implements other provisions of the 1996 Act will determine whether the 1996 Act ultimately advances the public interest by promote the emergence of wireless cable and other competitive alternatives to cable

II. WIRELESS CABLE CONTINUES TO EMERGE AS A COMPETITIVE ALTERNATIVE TO WIRED CABLE.

In no small measure thanks to the pro-competitive policies of the 1992 Cable Act and the Commission's implementing rules, wireless cable is already providing consumers in

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[3]Pub. L. No. 104-104, 110 Stat. 56 (1996).

[4]For example, Section 403(c) of the 1996 Act empowered the Commission to delegate to the staff authority to decide from among mutually-exclusive Instructional Television Fixed Service ("ITFS") applications. The Commission implemented that authority on March 7, 1996. *See Implementation of Section 403(c) of the Telecommunications Act of 1996*, FCC 96-92, 2 CR 276 (rel. March 8, 1996). Already, the staff has decided a number of cases involving mutually-exclusive ITFS applications, expediting the ability of the affected wireless cable operators to provide service to the public.

many markets with a competitive alternative to their wired cable service provider, and soon will be expanding across the country.

The wireless cable industry has experienced substantial growth since passage of the 1992 Act. When Congress was debating the 1992 Cable Act, the wireless cable industry was operating just 45 systems, serving approximately 350,000 subscribers.[5/] In the Section 19(g) report submitted to Congress last year, the Commission found that wireless cable had grown to "approximately 190 systems serving 800,000 subscribers."[6/] Today, WCA estimates that there are approximately 200 systems in operation, serving about 900,000 subscribers. Experts such as Paul Kagan Associates, Inc. ("Kagan") are predicting that wireless cable will serve approximately 1.2 million subscribers by the end of 1996.[7/] Over the long term, substantial growth is anticipated, particularly once the industry converts to digital technology.[8/] Kagan estimates that by 1999, the industry will be serving 4,038,000

[5/] S.R. No. 102-92, 102d Cong., 1st Sess. at 14.

[6/] *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 - Annual Assessment of the Status of Competition the Market for the Delivery of Video Programming*, 11 FCC Rcd 2060, 2091 (1995) [hereinafter cited as "*1995 Competition Report*"].

[7/] *Wireless Cable Investor*, at 1 (March 29, 1996).

[8/] WCA reported last year that the industry was in the throws of an unprecedented consolidation as wireless cable system owners sought to achieve substantial size in terms of number of homes passed in order to tap the debt and equity markets that are essential to growth. While that trend slowed significantly during the early part of this year, when the anti-collusion rule associated with the auction of Multipoint Distribution Service ("MDS") Basic Trading Area authorizations prevented bidders from discussing mergers

(continued...)

subscribers.[9/] Similarly, the Multimedia Research Group of Sunnyvale, CA, expects subscribership to top 4,000,000 and wireless cable to generate $2 billion in annual revenue by the year 2000.[10/]

Admittedly, the months since the Commission released its second annual report to Congress saw somewhat less growth in the wireless cable industry than had initially been expected. Counter-intuitively, that is good news -- the Commission would be mistaken to see this as a repudiation of the Commission's faith in wireless cable's ability to emerge as an effective competitor to franchised cable. To the contrary, the recent slow growth of the industry can be traced to one factor -- the coming digitization of many wireless cable systems. Simply stated, many wireless cable operators have been reluctant to expend significant funds in launching new analog systems or adding additional analog subscribers to existing systems when digitization is just around the corner

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[8/](...continued)
and acquisitions, the pace of consolidation is increasing. For example, On April 26, 1996, Wireless One, Inc. and TruVision Wireless, Inc., the two largest wireless cable operators serving the Southeastern United States, announced a merger that is expected to close shortly. *See, e.g. Wireless Cable Investor*, at 1 (April 30, 1996). And, just two days later, BellSouth Corp. announced that it was acquiring the New Orleans wireless cable system, continuing the trend towards local exchange carrier entry into the wireless cable industry. *See id.*

[9/]*Wireless Cable Investor*, at 2 (Jan. 31, 1996). WCA respectfully refers the Commission to the January 31, 1996 issue of *Wireless Cable Investor* for the most accurate information and projections responsive to the questions raised by subsections (a) through (c) of Paragraph 14 of the *NOI*.

[10/]Pendleton, "Staking Out the Competition," *Cable World* at 78, 84 (May 8, 1995).

The Commission paved the way for the conversion of many wireless cable systems to digital technology last week when it released its long-awaited *Declaratory Ruling and Order* in DA 95-1854.[11] That historic document, which resulted from an unprecedented joint filing by WCA and 98 other wireless cable system operators, MD) and ITFS licensees, equipment manufacturers, engineering consultants and other industry groups, established interim rules and policies to govern the process of authorizing licensees to operate utilizing digital modulation techniques. The *Declaratory Ruling and Order* arrived just in time, for several equipment manufacturers have committed to making digital wireless cable equipment available in quantity within the coming months. As a result, WCA anticipates that fully digital wireless cable systems capable of delivering over 120 channels will be serving subscribers by the end of 1996.[12]

The net result is that, by this time next year, the wireless cable industry should be providing far greater competition to the franchised cable industry than it is today. The Commission correctly has recognized on several occasions that wireless cable's ability to effectively compete is hampered by its current inability to transmit as many channels as its

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[11] *See Request for Declaratory Ruling on the Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations*, FCC 96-304 (rel. July 10, 1996).

[12] *See* Lambert, "Wireless Cable Gaining Strength," *Cable World*, at 1 (July 8, 1996).

cable and DBS competition.[13/] Yet, the Commission has also correctly acknowledged that "the use of digital compression is expected to alleviate wireless cable's channel capacity problem in the near future."[14/] Chairman Hundt clearly had it right when he announced that:

> we are committed to introducing competition to the cable pipe . . . by letting [wireless cable] services become commercially viable. *To do this, we have to let MMDS license holders go digital.*[15/]

The introduction of digital compression technology is not the only technological enhancement wireless cable operators are exploring to increase their competitive standing. Recently, for example, much excitement has been generated by successful tests utilizing wireless cable channels for high speed Internet access[16/] — a service similar to one the cable industry intends to introduce shortly.[17/] Clearly, as a result of changing consumer

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[13/] *See 1994 Competition Report*, 9 FCC Rcd at 7485; *Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Notice of Proposed Rulemaking*, 9 FCC Rcd 7665, 7666-67 [hereinafter cited as "*MDS Auction NPRM*"]; *Amendment of Part 74 of the Commission's Rules Governing Use of the Frequencies in the Instructional Television Fixed Service*, 9 FCC Rcd 3360, 3364 (1994).

[14/] *1994 Competition Report*, 9 FCC Rcd at 7488; *see MDS Auction NPRM*, 9 FCC Rcd at 7667.

[15/] Remarks by Chairman Reed Hundt before the Wertheim-Schroder Variety Conference, at 8 (April 4, 1995)(emphasis added) [hereinafter cited as "*Hundt Remarks*"].

[16/] *See* Barholt, "Downstream Data A Hot WCA Topic," *Cable World*, at 6 (July 15, 1996).

[17/] *See 1995 Competition Report*, 11 FCC Rcd at 2121-22.

expectations, wireless cable operators will have to provide more than traditional multichannel video programming in order to survive in a world where convergence is a fact of life. The extensive testing of high speed Internet access and other innovative services being conducted by the industry is evidence that wireless cable operators are up to the competitive challenge convergence presents.

However, the extent of to which wireless cable system operators will be competitive in the future will depend, at least to some extent, upon the rules that are ultimately adopted by the Commission in implementing the 1996 Act. While certain of the implementation issues pending before the Commission (such as interconnection, number portability and related issues) are beyond the scope of this video-oriented proceeding, other issues arising out of the 1996 Act are appropriately the subject of the Commission's annual report to Congress under Section 19(g) of the 1992 Cable Act.

III. THE COMMISSION SHOULD IMPLEMENT THE 1996 ACT WITH AN EYE TOWARDS PROMOTING WIRELESS CABLE AS TRUE COMPETITION TO CABLE.

A. Proper Implementation of Section 207 of the 1996 Act As Proposed By WCA Is Essential To Assure Consumers Have Fair Access To Wireless Communications Services.

As WCA has previously advised the Commission on numerous occasions, among the most significant impediments to competition are local governmental and private restrictions on the installation, maintenance and use of wireless cable reception antennas.[18/] Not

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[18/] *See, e.g. See, e.g.* Comments of WCA, MM Docket No. 89-600, 93-103 (filed March 1, 1990); Comments of WCA, CS Docket No. 94-48, at 26 (filed June 29,

(continued...)

surprisingly then, the wireless cable industry was gladdened when Congress adopted WCA's proposal and passed Section 207 of the 1996 Act, which directs the Commission to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite service."[19/]

In implementing Section 207, the Commission must assure that it does not undercut this clear statement of Congressional policy by affording undue deference to local authorities. WCA does not deny that there are legitimate local interests associated with wireless cable reception antennas. However, the record is clear that local authorities have abused their power in a manner that cannot be squared with Congress' desire to promote wireless competition in the telecommunications marketplace.[20/]

[18/](...continued)
1994)("cable operators have begun to pre-wire residential units for cable service at no charge to the developer in exchange for deed covenants and other restrictions forever barring the homeowner from installing rooftop antennas."); Comments of WCA, CS Docket No. 95-61, at 27 (filed June 30, 1995); Comments of WCA in Response to Notice of Proposed Rulemaking, IB Docket No. 95-59, at 3 (filed July 24, 1995)("[WCA's] members have long encountered roadblocks erected by local authorities to the installation of wireless cable reception antennas."); Comments of WCA, CS Docket No. 96-83 (filed May 6, 1996)[hereinafter cited as "WCA Antenna Comments"].

[19/]1996 Act, § 207.

[20/]This is best illustrated by the request by some that local authorities be permitted to preclude the installation, use and maintenance of wireless cable antennas so long as some other multichannel video service is made available to residents. *See* Issues and
(continued...)

In CS Docket No. 96-83, the Commission has pending before it a series of rules proposed by WCA that, if adopted, would protect the legitimate interests of local authorities, while achieving the objectives of Section 207. Specifically, WCA has proposed that the Commission preempt only those state or local zoning, land-use, building, or similar regulations that impair[21] the installation, maintenance, or use of devices designed for over-the-air reception of television broadcast or wireless cable signals.[22] To implement that preemption, the Commission would bar any civil, criminal, administrative, or other legal action of any kind to enforce any regulation that affects the installation, maintenance, or use of such devices until the promulgating authority has obtained either a final declaration from the Commission that such regulation does not impair the installation, maintenance, or use of

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[20](...continued)
Position Statement of The Caughlin Ranch Homeowners' Ass'n, CS Docket No. 96-83, at 3-4 (filed May 6, 1996)(contending that so long as homeowners association permits unimpaired installation of DBS antennas, it may restrict wireless cable and television antennas); Comments of Nat'l Apartment Ass'n, at 13-14 (suggesting that availability of cable service should justify restrictions on alternatives); Comments of the Community Associations Institute, *et al* CS Docket No. 96-83, at 27-28 (filed May 6, 1996). Those requests ignore the clear mandate of Congress. Section 207 is designed to promote competition and the widest availability of service — it does not permit local authorities to determine whether wireless cable service will be made available.

[21]In determining what restrictions are preempted, WCA has suggested that the Commission make clear that restrictions can "impair" reception without preventing it. In particular, WCA has urged that restrictions that unduly delay the installation of wireless cable antennas be preempted, as they have the effect of driving potential subscribers to alternative service providers, depriving consumers of the benefits of a competitive choice.

[22]*See* WCA Antenna Comments, at 7-13

such devices or a waiver from the Commission due to exceptional circumstances.[23/] To avoid an undue burden on the Commission, WCA has suggested that BOCA or a similar organization, in consultation with WCA, craft a model approach to regulation of wireless cable antennas that could be presented to the Commission once and, if approved, adopted and enforced by local authorities without further intervention.[24]

Adoption of an approach along the lines suggested by WCA is essential if wireless competition is to blossom. Section 207 evidences Congress' recognition that local authorities, many of whom receive substantial revenues from franchise fee paying cable operators, were unreasonably restraining wireless competition. Only by preempting those local restrictions that impair wireless cable reception can the Commission assure that wireless cable systems can achieve the federal goal of competition.

[23/] *See id.*

[24/] WCA's proposal would also ban the promulgating authority from enforcing a regulation that affects the installation, maintenance or use of such devices or impose any penalties pursuant thereto until 30 days after it has provided written notice to the person against whom it wishes to enforce the regulation that such regulation has been authorized by the Commission. *See* WCA Antenna Comments, at 27-28. In addition, under WCA's proposal no restrictive covenant, encumbrance, homeowners' association rule, or other nongovernmental restriction could be enforced to the extent that it impairs a viewer's ability to receive video programming signals from over-the-air television broadcast or wireless cable stations. *See id.*, at 23-24.

B. The Commission Must Minimize The Harm To Consumers Resulting From Recent Changes To The Uniform Pricing Requirements Of The 1992 Cable Act.

As adopted by the 1992 Cable Act, Section 623(d) of the Communications Act had mandated that each cable operator "have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system." [25/] In WCA's view, Section 623(d) was one of the most important pro-competitive element of the 1992 Cable Act. Thus, WCA was disappointed when Congress chose in the 1996 Act to significantly water down the protection Section 623(d) offered consumers.

Section 301(b) of the 1996 Act amended Section 623(d) in two respects. First, it added language providing that the uniform pricing requirement "does not apply to . . . a cable operator with respect to the provision of cable service over its cable system in any geographic area in which the video programming services offered by the operator in that area are subject to effective competition." And second, it added that "Bulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit." As troubling as these provisions are on their face, in CS Docket No. 94-85 and elsewhere, the cable industry is urging the Commission to read these provisions

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[25/] 47 U.S.C. § 543(d) (1994).

in an unduly broad manner that, if agreed to by the Commission, would do great harm to consumers.

1. The Commission Must Carefully Interpret The New Definition Of "Effective Competition" To Assure That The Uniform Pricing Requirement Is Not Lifted Prematurely.

The Commission, in its *Third Order on Reconsideration* in MM Docket Nos. 92-266 and 92-262,[26] interpreted the uniform pricing requirement of Section 543(d) of the Communications Act[27] to require each cable operator to set a geographically uniform price structure within each franchise area regardless of whether the system is subject to "effective competition."[28] However, on June 6, 1995, the United States Court of Appeals for the District of Columbia Circuit handed down a decision in *Time Warner Entertainment Co., L.P. v. FCC* reversing the *Third Order on Reconsideration* in part and exempting cable systems that face "effective competition" from the uniform pricing requirement of Section 543(d).[29] That decision was codified in the 1996 Act

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[26] *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Buy-Through Prohibition, Third Order on Reconsideration*, 9 FCC Rcd. 4316 (1994) [hereinafter cited as "*Third Order on Reconsideration*"].

[27] 47 U.S.C. § 543(d).

[28] *See Third Order on Reconsideration*, 9 FCC Rcd. at 4325-27; 47 C.F.R. § 76.984.

[29] *See Time Warner Entertainment Co., L.P. v. FCC*, No. 93-1723, slip op. at 10-11 (opinion for the Court by Rogers, J.) (D.C. Cir. June 6, 1995).

In WCA's view, Congress' decision to amend its uniform pricing rules to exempt those cable systems that are subject to effective competition threatens to revive discriminatory "rifle shot" marketing practices by certain cable systems that had impeded competition before they were banned by the Commission. One of Congress' goals in passing the 1996 Act was to protect consumers and assure the benefits of competition. The Commission's uniform pricing rules protected all cable programming consumers from discriminatory pricing between customers based on whether a competitive service is available in the area or subscribed to. In extending the uniform pricing requirement to cable operators regardless of whether they face "effective competition," the Commission noted that the charging of different rates with no economic justification and unfairly undercutting competitors' prices could occur even in areas with sufficient competition or with low penetration sufficient to meet the 1992 Cable Act's definition of "effective competition."[30/] Such irregular rates, the Commission correctly noted, "would not only permit the charging of noncompetitive rates to consumers that are unprotected by either rate regulation or competitive pressure on rates, but also stifle the expansion of existing, especially nascent, competition."[31/]

[30/] *See Third Order on Reconsideration*, 9 FCC Rcd. at 4327.

[31/] *Id.* The Commission's reasoning in extending the uniform pricing requirement to all cable systems is significant, for it illustrates the importance of this issue to consumers:

> For example, if a wireless cable operator served 60% of the homes passed

(continued...)

In WCA's view, the Commission's analysis was the correct one, for Section 543(d) and the Commission's implementing rules contributed to the growth of wireless cable as a viable competitor in the multichannel video marketplace. In its 1996 Section 19(g) report, the Commission should urge Congress to amend the Communications Act to provide a mechanism by which all consumers within a franchise area can enjoy the benefits of competitive pricing, even consumers that either cannot, or choose not to, subscribe to an alternative provider.

For the same reasons, the Commission should implement Section 301(b) with great care. Otherwise, there is a significant risk that cable systems will be found to face "effective competition" when none exists, and thus be freed from the uniform pricing requirements prematurely. That risk is perhaps best illustrated by the ongoing attempt by Multi-Channel TV Cable Company d/b/a Adelphia Cable Communications ("Adelphia") to secure a declaration from the Commission that Adelphia's cable television system serving the City

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[31/](...continued)
by a cable system in a franchise area and achieved a 30% penetration rate, effective competition would be found. Under our current rule [*i.e. the rule that has just been reinstated by the Court*], the cable operator would be free to charge one price where the wireless cable system reaches and a higher price where it does not. That could result in the subsidization of the cable operator's competitive responses to the wireless cable operator by the 40% of consumers who do not have a choice of competing operators.

Accordingly, we will apply the uniform rate structure requirement to all franchise areas, whether or not the cable system is exempted from rate regulation by the effective competition provisions of Section 623(b).

Id.

of Charlottesville and Albemarle County, Virginia faces effective competition from wireless cable operator CFW Cable, Inc. ("CFW Cable").[32] Although CFW Cable serves only a small fraction of the residents of these areas and thus does not provide effective competition as defined by the 1992 Cable Act,[33] and although CFW Cable is having no demonstrable impact on Adelphia's ability to raise rates — to the contrary, Adelphia is in the process of raising rates to unprecedented levels — Adelphia nonetheless has asked the FCC to rule that CFW Cable provides "effective competition."

Adelphia bases its claim of facing effective competition on one thin reed — CFW Cable is owned by the same company that owns Clifton Forge-Waynesboro Telephone Company ("CFW Telephone"), a small local exchange carrier. In so doing, however, Adelphia is attempting to stretch the recent passage of Section 301(b)(3)(D) of the 1996 Act beyond all recognition.

What Adelphia ignores is that while CFW Telephone provides local exchange service to 28,000 customers in the cities of Waynesboro, Clifton Forge and Covington, Virginia, *it does not provide local exchange service in Charlottesville or Albemarle County.* Nonetheless, Adelphia argues that CFW Cable qualifies as "effective competition" under

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[32] *See* Adelphia Petition for Decertification and Finding of Effective Competition, CSR-4730-E.

[33] *See* 47 U.S.C. Section 543(l)(1)(A)-(C). As of April 18, 1996, CFW Cable only had 740 subscribers out of 16,785 households in the City of Charlottesville; as of June 4, 1996, after the departure of local college students, CFW Cable only had 613 subscribers in the City of Charlottesville.

Section 301(b)(3)(D) of the 1996 Act solely due to its affiliation with CFW Telephone. Adelphia's argument is flatly at odds with the basic principle that statutory terms are to be interpreted in accordance with their plain meaning.[34] Simply put, local means *local*, and hence the term "local exchange carrier" in Section 301(b)(3)(D) cannot logically be interpreted to include out-of-region telephone companies such as CFW Telephone that do not provide local exchange service in the cable operator's franchise area. If the Commission finds otherwise, it will free from the uniform pricing requirement numerous cable systems that are not constrained in their rate-setting by marketplace forces.

2. The Commission Should Interpret The "Bulk Discount" Exception To The Uniform Pricing Rule Narrowly.

In the *Order and Notice of Proposed Rulemaking* ("*Cable Order & NPRM*") released by the Commission on April 9, 1996 in CS Docket No. 96-85,[35] the Commission tentatively concluded that the new "bulk discount" exception to the uniform rate requirement added by the 1996 Act only applies where a cable operator negotiates a single "bulk" sale with the multiple dwelling unit ("MDU") property owner or manager, *not* where the cable operator offers discounted rates on an individual basis to subscribers simply because they are residents

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[34] *See, e.g., T.V.A. v. Hill*, 437 U.S. 153 (1978).

[35] *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, FCC 96-154, CS Docket No. 96-85 (rel. Apr. 9, 1996)[hereinafter cited as "*Cable Order & NPRM*").

of an MDU.[36] WCA agrees with that interpretation, and urges the Commission to reject efforts by the cable industry to have the Commission ignore the plain language of the statute and apply the "bulk discount" exception where cable service is sold directly to individual subscribers rather than in bulk.[37]

As the Commission has recognized, "there is a fundamental difference between the nature of bulk rate accounts and individual residential accounts."[38] Historically, the Commission has used the term "bulk discount" when referring to reduced rates offered on a bulk contract basis directly to owners and managers MDU properties, and not to any reduced "per unit" rates charged to individual subscribers.[39] That should come as no surprise to the cable industry, which in the past has recognized the difference.[40] The plain language of Section 301(b)(2) of the 1996 Act specifically authorizes departures from uniform pricing

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[36] *See id.* at ¶ 98.

[37] *See, e.g.*, Comments of Nat'l Cable Television Ass'n, Inc., CS Docket No. 96-85, at 44-45 (filed June 4, 1996); Comments of Time Warner Cable, CS Docket No. 96-85, at 35 (filed June 4, 1996); Comments of Cox Communications, Inc., CS Docket No. 96-85, at 10-11 (filed June 4, 1996); Comments of Comcast Cable Communications, Inc., CS Docket No. 96-85, at 11-12 (filed June 4, 1996)

[38] *Social Contract for Continental Cablevision*, 11 FCC Rcd 299, 327 (1995).

[39] *See, e.g., Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5898 (1993).

[40] *See* Reply Comments of WCA, CS Docket No. 96-85, at 2-3 (filed June 28, 1996).

only to reflect discounts provided for bulk accounts at MDU properties.[41] There is no indication in the language of Section 301(b)(2) or in its legislative history to suggest any intent by Congress to permit cable operators to depart from uniform pricing when entering into individual subscription relationships with individual MDU residents. Presumably, if Congress had intended to give cable operators *carte blanche* in setting rates to individual residents of MDUs, it would not have included the "bulk discount" language of Section 301(b)(2).[42]

The cable industry is also urging the Commission to depart from the language of the statute by permitting the "bulk discount" exception to apply outside of the MDU context. As is recognized by the *Cable Order & NPRM*, Congress and the Commission historically have defined a "multiple dwelling unit" as being a single building that contains multiple residences.[43] Cable, however, urges the Commission to permit deviations from uniform

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[41] *See* 1996 Act, § 301(b)(2) ("*Bulk discounts to multiple dwelling units* shall not be subject to this subsection, except that a cable operator . . . may not charge predatory prices *to a multiple dwelling unit*.) (emphasis added).

[42] It would run counter to the Commission's long-standing concerns over anti-competitive conduct by cable operators in the MDU environment to permit cable operators to end run the uniform pricing requirement when dealing with MDU residents. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 11 FCC Rcd 2060, 2155 (1995); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5898 (1993).

[43] *See Cable Order & NPRM*, at ¶ 99; *See also*, *Massachusetts Community Antenna Television Commission*, 2 FCC Rcd 7321, 7322 (1987); *Amendment of Part 76 of the Commission's Rules and Regulations with Respect to the Definition of a Cable*

(continued...)

pricing in non-MDU environments given that the 1996 Act expanded the so-called "private cable exemption" from local franchising to permit private cable operators to interconnect any type of buildings via wire without a franchise, so long as no public right of way is crossed.[44] WCA vigorously opposes any expansion of the bulk sale exception to uniform pricing outside the MDU context.

As the Commission itself has noted, the term "multiple dwelling unit" has been afforded a very limited meaning.[45] There is nothing in the 1996 Act or its legislative history to suggest Congress intended to deviate from that definition and permit non-uniform pricing outside of MDUs. Indeed, the fact that the 1996 Act modified the "private cable exemption" to eliminate any reference to MDUs demonstrates that Congress is fully capable of distinguishing between MDUs and other situations where private cable service is provided. Just as Congress expanded the "private cable exemption" beyond MDUs, Congress could

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[43](...continued)
Television System and the Creation of Classes of Cable Systems, 633 F.C.C. 2d 956, 996-97 (1977).

[44]*See Cable Order & NPRM*, at ¶ 99.

[45]*Id.*

have just as easily expanded the "bulk discount" exception to include non-MDU properties.[46] However, Congress chose not to do so.

IV. AMENDING SECTION 628 OF THE COMMUNICATIONS ACT TO ASSURE FAIR DEALING BY ALL PROGRAMMERS, WHETHER OR NOT VERTICALLY INTEGRATED AND WHETHER OR NOT THEY UTILIZE SATELLITE DISTRIBUTION, WILL PROMOTE COMPETITION

With just a few exceptions, the provisions of the 1992 Cable Act designed to assure wireless cable operators fair access to programming have proven effective. The relative paucity of complaints filed with the Commission on program access issues strongly suggests that most programmers are making good faith efforts to comply with the letter and with the spirit of the law.

Yet, events since passage of the 1992 Cable Act demonstrate that loopholes exist which can be taken advantage of to deprive emerging multichannel video programming distributors ("MVPDs") of fair access to programming. In retrospect, the greatest flaw in the 1992 Cable Act's efforts to promote fair access to programming was Congress' decision to limit the scope of Section 19 to only those programmers in which a cable operator has an attributable interest.

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[46] *Compare Telephone Company-Cable Television Cross Ownership Rules*, 10 FCC Rcd 244, 276 (1994) ("[W]e addressed and rejected assertions that Congress intended to codify the interpretive notes to Section 63.54 of our rules. . . In support of this assertion, we noted that Congress changed the language of our cross-ownership rules, specifically codifying some aspects of these rules, while overruling others. We also noted that Congress could have explicitly codified Notes 1 and 2 had it intended to, but did not.").

Simply put, the power that wired cable exerts over programmers stems not only from vertical integration, but also from its status as the current local distribution monopoly. Wireless cable, DBS and other emerging technologies will some day provide effective local distribution outlets for programmers. Today, however, their combined subscriber base is so small that no programmer can hope to survive without substantial wired cable carriage. As a result, all programmers, whether or not vertically integrated, are subject to the market power of wired cable.[47] WCA agrees with Prof. David Waterman, who recently has concluded that "[a]ny program access requirements should apply equally to integrated and nonintegrated program suppliers."[48]

In its most recent report to Congress, the Commission refrained from making any recommendations to Congress on the grounds that it lacked specific evidence of a significant problem.[49] That is no longer the case. Indeed, this week's issue of *Cable World* highlights the problem. In an article headlined "Raising The Exclusivity Ante," *Cable World* confirms

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[47]Indeed, when Sumner M. Redstone, Chairman of Viacom International, Inc. ("Viacom"), testified before the Senate Subcommittee on Antitrust, Monopolies, and Business Rights concerning the anti-competitive abuses Viacom has suffered at the hands of Tele-Communications, Inc. ("TCI"), he forthrightly admitted that Viacom had been subjected to abuse, yet failed to come forward before because it feared retaliation. *Communications Daily*, Vol. 13, No. 208 at 2 (released October 28, 1993).

[48]Waterman, "Vertical Integration and Program Access in the Cable Television Industry, 47 *Fed. Comm. L.J.* 511, 528 (1995)

[49]*See 1995 Competition Report*, 11 FCC Rcd at 2140.